INTERIM POLICY ON INCENTIVES FOR SELF-POLICING:

ENVIRONMENTAL AUDIT POLICY

POLICY ENF-97.004

I. INTRODUCTION

A. PURPOSE AND INTENT

One of the most important responsibilities of the Department of Environmental Protection (DEP) is ensuring compliance with laws that protect public health, safety and welfare, and the environment. The threat of stringent enforcement has historically served as a chief incentive to secure compliance and remediation of harm.

Because government resources available for enforcement are limited, a maximum level of compliance cannot be achieved without active efforts by the regulated community. Achieving compliance, therefore, also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, DEP seeks to provide incentives to encourage voluntary compliance.

This interim policy sets forth how DEP expects to exercise its enforcement discretion in determining an appropriate enforcement response and administrative penalty for violations discovered during the course of an environmental audit.

It is intended to promote a higher standard of self-policing by reducing penalties and refraining from recommending criminal prosecution for violations that are discovered through voluntary audits, compliance management systems or other activities that

demonstrate due diligence, and that are promptly disclosed and expeditiously corrected.

B. APPLICABILITY AND LEGAL EFFECT

This policy applies to all administrative enforcement actions against regulated entities that discover violations through either an environmental audit or documented, systematic due diligence, except that this policy does not apply to municipalities. **[NOTE:** Refer to DEP Interim Policy on Compliance Incentives for Municipalities, (POLICY ENF-97.003).**]**

This policy applies to all such actions commenced after the effective date of this policy, April 26, 1997, and to all pending cases in which DEP has not reached agreement in principle with the regulated entity on the amount of an administrative penalty.

This policy supplements the principles and presumptions contained in Sections III and IV of the Enforcement Response Guidance (ERG), and the DEP Interim Policy on Compliance Incentives for Small Business (POLICY ENF-97.002), and should be read in conjunction with them.

This policy does not apply to self-certification statements required of regulated entities by the DEP Environmental Results Program, or to the Audit Program conducted pursuant to M.G.L.Chapter 21E.

This policy does not apply to settlements of claims for stipulated or suspended penalties for violations of consent orders or other settlement agreement requirements.

II. DEFINITIONS

For the purposes of this policy, the following definitions apply. Some terms used in this policy may also be more fully discussed in the ERG.

"Calculation Guidance" refers to the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001).

"Due diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

1) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, certifications and other sources of authority for environmental requirements;

2) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignments of specific responsibility for assuring compliance at each facility or operation;

3) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

4) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents, including those concerning disclosure of information about chemicals;

5) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures (e.g., specific resonsibilities embodied in job descriptions and sanctions through appropriate disciplinary mechanisms for failure to perform); and

6) Procedures for reporting releases and for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program or facility to prevent future violations and releases.

7) Use of appropriately qualified or, where required, mandated experts (e.g., licensed hazardous waste facility, TRA planner, Licensed Site Professional).

"Economic benefit" refers to an adjustment factor that M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00 require DEP to consider in calculating the amount of an administrative penalty. DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001) provide that economic benefit should be calculated and added to the gravity based penalty whenever there is an indication that noncompliance resulted in delayed compliance costs, avoided compliance costs, and/or profits from unlawful activity.

"Environmental audit" is a systematic, documented and objective review and evaluation performed by a regulated entity, or performed by a third party, to determine whether a facility is in compliance with all applicable environmental requiements, and if not, which recommends appropriate and timely action to correct existing violations, and prevent, detect and correct future violations, including efforts described in the definition of "due diligence" above. **[NOTE:** This definition is intended for use in this policy, and does not apply to the audits or response actions performed pursuant to M.G.L. Chapter 21E.**]**

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit. **[NOTE:** Environmental audit report as defined here is for use in this policy, and does not apply to the Notice of Audit Findings used in the Audit Program conducted pursuant to M.G.L. Chapter 21E.**]**

"Punitive penalty" is that portion of an administrative penalty which reflects the gravity of the violations, duration of noncompliance, behavior and financial condition of the regulated entity and other relevant public interest considerations. A punitive penalty includes adjustments from the base number, as described in the DEP Guidlines for Calculating Administrative Penalties (POLICY ENF-90.001), on the basis of:

* the actual and potential impact of the violations;

* the actual or potential costs incurred, and actual and potential damages suffered by the Commonwealth;

* multiple days of occurrence;

* existence or lack of good faith;

* financial condition of the regulated entity; and

* any other relevant public interest considerations.

[NOTE: Punitive penalty does not include that portion of the penalty representing the regulated entity's economic benefit or gain from noncompliance. Also, punitive penalties doe not include Natural Resource Damages recoverable pursuant to M.G.L. Chapter 21E or CERCLA.**]**

"Public health, safety and welfare" refers to human health, safety and welfare.

"Regulated entity" **(or "person")** means any agency or political subdivision of the Commonwealth, any state, public or private corporation or authority, individual, trust, firm, joint stock company, partnership, association, or other entity, or any group thereof, or any officer, employee, or agent thereof. Without limiting the generality of the foregoing, the term "regulated entity" shall also include

1) any city, town, district, or body politic of the Commonwealth, and

2) any agency or authority of the Federal government whenever, as a matter of Federal law, that Federal agency or authority is required to comply with State law, and is subject to State-imposed penalties for noncompliance.

"Requirement" means any statute, regulation, order, license or approval issued or adopted by DEP, or any law which DEP has the authority or responsibility to enforce.

"Voluntary" means freely performed, and not as a result of being required by statute, regulation, license, permit, administrative or judicial order, consent order or agreement. Voluntary does not include performance of self-certification statements under the DEP Environmental Results Program.

"Willful blindness" is the deliberate avoidance of learning facts or the failure to acquire specific knowledge when other facts are known that would induce most people to acquire the specific knowledge in question.

III. STATEMENT OF POLICY

A. INCENTIVES FOR SELF-POLICING

Where the regulated entity has established that it satisfies all of the conditions of Section III.B. of this policy, DEP may exercise its enforcement discretion by providing the following incentives to encourage voluntary self-policing.

1. No Notice of Noncompliance

If the initial enforcement response for the violations would normally be a Notice of Noncompliance (NON), DEP will not issue an NON, or otherwise use the violations to establish a foundation for future enforcement.

2. No Punitive Penalties

If any violations warrant the assessment of an administrative penalty, DEP will not seek a punitive penalty, as that term is defined in this policy, for the violations. This policy limits the complete waiver of the punitive portion of the penalty to regulated entities that discover violations through either (a) an environmental audit, as defined in this policy, or (b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence, as defined in this policy, in preventing, detecting, and correcting violations. The regulated entity has the burden of establishing that it satisfies all conditions of Section III.B., and is entitled to a waiver of the punitive penalty.

It is DEP's practice to collect any economic benefit that may have been realized as a result of noncompliance, even where a regulated entity has met all other conditions of the policy. Recovery of economic benefit may be waived, however, where DEP determines that it is insignificant.

Further, waiver of a punitive penalty does not include waiver of the obligation to remediate harm caused by any violation of environmental requirements. DEP reserves the right to use the record of such violations as a foundation for establishing a pattern of non-compliance as a component of any future enforcement action.

If the regulated entity sufficiently demonstrates an inability to pay, and satisfies all of the conditions of Section III.B. of this policy, DEP may offer an alternative payment plan, as that term is defined in ERG Section II, to recover the full economic benefit.

If the regulated entity sufficiently demonstrates that payment of any penalty will significantly impede its ability to comply or perform a remedial measure, DEP may suspend or waive payment of any penalty. In this case, DEP staff should first consider the use of an alternative payment plan to recover at least a portion of the

economic benefit prior to considering suspension or waiver of the full amount.

3. Reduction of Punitive Penalty by 50%

Regulated entities often discover violations through means less systematic than an environmental audit. To provide encouragement for this kind of self-policing, DEP will reduce the penalty for any violation of environmental requirements up to 50% of the punitive penalty, provided that the regulated entity satisfies all of the conditions of Section III.B(2) through (9) below (i.e., the regulated entity voluntarily discovered, promptly disclosed and expeditiously corrected a violation even though it was not found through an environmental audit and the regulated entity cannot document due diligence). Specifically, DEP will calculate a penalty according to the Calculation Guidance, and reduce the punitive portion, not including the regulated entity's economic gain from noncompliance, up to 50%.

In resolution of these cases, the establishment of a management process that satisfies the six (6) criteria included in the definition of due diligence should be included as a term of settlement as appropriate to the nature and size of the regulated entity.

4. No Criminal Recommendations

DEP will not recommend to the Massachusetts Office of the Attorney General or other prosecuting authority that criminal charges be brought against a regulated entity where DEP determines that all of the conditions in Section III.B. are satisfied, and where the violation, **in the judgment of the DEP/AG Case Screening Committee**, does not demonstrate or involve:

(a) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

(b) high-level corporate officials' or managers' willful blindness, as that term is defined in this policy, to the violations, or conscious involvement in the violations after blindness.

Whether or not DEP recommends the regulated entity for criminal prosecution under this section, DEP reserves the right to

recommend prosecution for the criminal acts of individual officers, managers or employees.

Whether or not DEP recommends the regulated entity for criminal prosecution under this section, the Massachusetts Office of the Attorney General and other prosecuting authority retain independent authority to initiate criminal charges against a regulated entity.

5. No Routine Request for Audit Reports

DEP will not routinely request or use an environmental audit report, as that term is defined in this policy, to initiate an investigation of, or an enforcement action against the regulated entity. For example, DEP will not routinely request environmental audit reports when it conducts inspections. However, if DEP has reason to believe, independent of information in an environmental audit report, that a violation has occurred, DEP may seek any information, including environmental audit reports, relevant to identifying violations and determining liability or extent of harm.

DEP preserves its rights to inspect a facility after deadlines for correcting noncompliance disclosed through an audit have elapsed. In addition, DEP will inspect a facility at any time should it have reasonable cause to believe that an imminent threat or actual harm has occurred and is ongoing at the time.

B. CONDITIONS TO SATISFY FOR PENALTY RELIEF

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit, as defined in this policy; or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to DEP as to how it exercises due diligence to prevent, detect and correct violations according to the

criteria outlined in the definition of due diligence in this policy. DEP may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available in order to allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring, testing, record-keeping, reporting, sampling or notification requirement prescribed by statute, regulation, license, permit, judicial or administrative order, consent order or agreement. For example, this policy does not apply to:

(a) self-certification statements required under the DEP Environmental Results Program;

(b) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(c) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or

(d) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses to DEP a specific violation within ten (10) days (or such shorter period required by law) after it has discovered that the violation occurred, or may have occurred. Where a statute or regulation requires reporting be made in less than ten (10) days, disclosure shall be made within the time limit established by law.

The initial notification of a violation pursuant to this policy may be by telephone call within the ten-day period, but must then be confirmed in writing within five (5) days of the telephone

call. Both must be received by the responsible compliance and enforcement manager, or designated alternate in the appropriate DEP Office.

In situations where the violation is complex and the regulated entity believes that it cannot definitively determine compliance within the ten-day period, the regulated entity must notify DEP of the situation within the ten-day period, request an extension of time, assume the burden of showing that additional time is needed to determine compliance status, and work with DEP to make a definitive determination of compliance status. DEP may extend the period of time if the circumstances do not, in the sole discretion of DEP, present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

4. Discovery and Disclosure Independent of Government or Third Party

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to DEP (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) discovery of the violation through any other means by a regulatory agency.

5. Correction and Remediation

The regulated entity corrects the violation within thirty (30) days of discovery, certifies in writing that violations have been corrected, and takes appropriate measures as determined by DEP to remedy any harm to public health, safety and welfare or the environment due to the violation.

If DEP determines that an imminent threat to public health, safety or welfare, or the environment results, or could result from the violations, DEP may, pursuant to any relevant authority, require correction of violations and remediation of any harm earlier than thirty (30) days of the regulated entity's discovery.

If more than thirty (30) days will be needed to correct the violation(s), the regulated entity must notify DEP in writing before the thirty-day period has passed, request an extension of time, and assume the burden of showing that additional time is required. Where appropriate, DEP may require that to satisfy conditions 5 and 6, a regulated entity enter into an appropriate, publicly available, enforceable agreement (e.g., administrative consent order), particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required. DEP may require the violator to agree to a stay of the statute of limitations if necessary to assure completion of remediation.

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include, but not be limited to improvements to its environmental auditing or due diligence efforts.

7. No Previous Higher Level Enforcement

The specific violation (or closely related violation) has not been included in a higher level enforcement action, as that term is defined in ERG Section II, taken by DEP, the Massachusetts Office of the Attorney General, or U.S. Environmental Protection Agency against the regulated entity within the past five (5) years at the same facility, or is not part of a pattern of federal, state or local violations by the regulated entity's parent organization (if any), which have occurred within the past three (3) years.

For purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law or regulation identified in a judicial or administrative order, consent agreement or order, complaint, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from DEP .

8. Other Violations Excluded

The violation is not one which, in the sole discretion of DEP:

(a) resulted in significant actual harm, or presented a significant risk of harm to public health, safety or welfare, or the environment;

(b) violates the specific terms of any administrative or judicial order, or consent agreement; or

(c) results from a failure to timely notify the DEP of a release or threat of release of oil and/or hazardous materials.

9. Cooperation

The regulated entity cooperates as requested by DEP, and provides such information as is necessary and requested by DEP to determine applicability of this policy. Cooperation includes, at a minimum, providing reasonable site access, all requested documents and access to employees and assistance in investigating the violation, any noncompliance related to the disclosure, and any environmental consequences related to the violations.

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